

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

AMAAL AZIZ,

Plaintiff,

vs.

Case No. 2005-4174-CB

MOHAMMAD MERZAH, et al,

Defendants.

OPINION AND ORDER

Defendants Ihsan Mirza, Ifaa Shakarchi, and Mirza & Merzah, Inc., have filed a motion for summary disposition.

I

Plaintiff filed this complaint on October 18, 2005.¹ Plaintiff alleges that defendants Ihsan Mirza (Mirza) and Ifaa Shakarchi (Shakarchi) transferred real property known as 22877 Hillock to her husband, Mohammad Merzah (Merzah), on November 18, 1997. Plaintiff alleges that, on the same day, Mirza, Shakarchi, Merzah and plaintiff executed an "irrevocable license to encroach," allowing Mirza to construct a commercial building on 22932 Groesbeck which encroached on 22877 Hillock. Plaintiff claims that on June 12, 2003, Merzah attempted to transfer his interest in 22877 Hillock by quitclaim deed to Mirza. Plaintiff avers that on August 19, 2003, defendant Mirza & Merzah, Inc. (MMI), transferred property known as 22932 Groesbeck to defendant S Three by warranty deed.² Plaintiff alleges that no mention of the

¹ Count I of plaintiff's complaint was dismissed pursuant to the Opinion and Order of March 21, 2006.

² Plaintiff does not explain the relationship between Mirza, who is referred to as to owner of 22932 Groesbeck in the "irrevocable license to encroach," and Mirza & Merzah, Inc., which allegedly transferred the property to S Three.



irrevocable license to encroach was made in this transfer. Plaintiff alleges that a memorandum of land contract covering both 22877 Hillock and 22932 Groesbeck between defendants S Three and S & R was recorded on September 24, 2004. Plaintiff does not indicate how, when or if title to 22877 passed from defendant Mirza to S Three.

Plaintiff claims that she never released her dower rights in 22877 Hillock, or received any consideration for her dower interest. Further, plaintiff claims that defendant Merzah, despite being married to plaintiff, identified himself as a "single man" in the quitclaim deed purporting to transfer ownership of 22877 Hillock to defendant Mirza. Plaintiff asserts that her dower interest in the property has been threatened by this allegedly fraudulent transfer. Therefore, plaintiff brought count I, for a declaration of rights regarding 22877 Hillock, and count II, for fraud, as to defendants Merzah, Mirza, Shakarchi and MMI only.³

On March 21, 2006, this Court entered an Opinion and Order granting defendants S Three and S & R's motion for summary disposition and dismissing those defendants from the case. In that Opinion and Order, the Court granted summary disposition of count I of plaintiff's complaint for reasons fully discussed therein. As such, the only count pending is plaintiff's count for fraud as to defendants Merzah, Mirza, Shakarchi and MMI.

II

Defendants Mirza, Shakarchi and MMI now move for summary disposition under MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim on which relief can be granted. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences that can be drawn from the facts. *Id.* The

motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial. *Id.* The Court must resolve all reasonable inferences in the nonmoving party's favor. *Id.*

III

In support of their motion, defendants Mirza, Shakarchi and MMI first note that plaintiff is a non-resident alien. As such, they aver that plaintiff is not entitled to dower since defendant Mirza conveyed property "under his own signature." Next, movants urge that plaintiff is barred from raising the issue of dower due to the doctrines of res judicata and collateral estoppel, noting that a previous case brought by plaintiff in Wayne County has been dismissed. Movants also argue that plaintiff is estopped from claiming that she had no knowledge of the purpose of the conveyance at issue since she executed an irrevocable license to encroach the subject property. Lastly, movants claim that plaintiff's complaint is frivolous and that sanctions are warranted in this matter.

In response, plaintiff asserts that a non-resident alien spouse is not precluded from seeking dower when a conveyance by the husband is part of a scheme to perpetrate fraud, which she alleges to have been the case with the conveyance at issue. Plaintiff next claims that the judgment of the Wayne County Circuit Court does not bar the present action since that court

³ The actual count is entitled "Count II – Fraud as to Mohammad Merzah, Ishan [sic.] and Ifaa," but the relief

found that it lacked subject matter jurisdiction and dismissed that case without prejudice. Plaintiff also claims that the case brought in Wayne County pertained to a dispute concerning different property. Finally, plaintiff asserts that sanctions are unwarranted.

IV

The general rule concerning the availability of dower for a non-resident alien provides that, "if the wife resides out of the state, her right of dower is barred by a conveyance executed by the husband alone." *Gluc v Klein*, 226 Mich 175, 177; 197 NW 691 (1924). However, it is well settled that "where the purchase and sale of land in Michigan is a part of the scheme to perpetrate a fraud upon the wife for the purpose of depriving her of her dower right," this rule "has no application." *Bear v Stahl*, 61 Mich 203, 215; 28 NW 69 (1886).

Plaintiff's case is premised on her contention that the defendants in this matter conspired to fraudulently deprive her of her dower interest in the property conveyed by her husband without her knowledge. Given plaintiff's allegation of fraud, the general rule expressed in *Gluc* is inapplicable, and the Court cannot say as a matter of law that plaintiff's dower interest is barred simply because she is a non-resident alien. Therefore, summary disposition on this basis is inappropriate.

The Court shall now address movants' contention that res judicata and collateral estoppel bar the present lawsuit. A subsequent action is barred by res judicata when the prior action was decided on the merits, the decree in the prior action was a final decision, both actions involve the same parties or their privies, and the matter in the second case was or could have been resolved in the first case. *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). The related doctrine of collateral estoppel generally precludes relitigation of an issue if a question of

fact essential to the judgment was actually litigated and determined by a valid and final judgment, the same parties had a full opportunity to litigate the issue, and there is mutuality of estoppel. *Nummer v Dep't of Treasury*, 448 Mich 534, 541-542; 533 NW2d 250 (1995).

In the case at bar, movants' have included an Order from Wayne County Circuit Court granting summary disposition of a claim brought by "Amalsalimaziz Mira" (sic.)⁴ in favor of defendants Mohammad Abdul Merzah, Ihsan Mirza, Altima Inc., Mirza & Merzah, Inc., Dexter Fuel Inc., and Dexter M & M, Inc. Defendants' Exhibit H. According to this Order, the Wayne County Circuit Court found that it lacked subject matter jurisdiction and dismissed the case without prejudice. Since a court that lacks subject matter jurisdiction cannot entertain a party's claims, see, e.g., *Derederian v Genesys Health Care Systems*, 263 Mich App 364, 375; 689 NW2d 145 (2004) (citations omitted), a dismissal without prejudice for lack of subject matter jurisdiction is not a decision on the merits for purposes of res judicata. Collateral estoppel is also inapplicable in the present case, since a dismissal for lack of subject matter jurisdiction is not a final judgment, nor does such a dismissal indicate that the parties were necessarily afforded a full opportunity to litigate the underlying issues. As such, the Court is satisfied that movants are not entitled to summary disposition of plaintiff's case on the bases of res judicata or collateral estoppel.

Next, the Court turns to movants' assertion that plaintiff is estopped from claiming fraud in this case since she signed an irrevocable license to encroach. Movants cite several cases in which an individual was estopped from claiming that he or she did not know the contents of agreements which the individual had signed. See, e.g., *Horn v Cooke*, 118 Mich App 740, 747; 325 NW2d 558 (1982); and see *Dombrowski v City of Omer*, 199 Mich App 705, 710; 502

NW2d 707 (1993). Movants also provide the affidavit of attorney Charles H. Earl, Jr., attesting to the circumstances regarding the conveyances at issue. Defendants' Exhibit E, Affidavit of Charles H. Earl, Jr.

However, the cases cited by movants are clearly distinguishable from the case at bar. Specifically, plaintiff has not asserted that she was unaware of what she was signing when she signed the irrevocable license to encroach or that the license itself is invalid. Further, the events described by Charles Earl are not inconsistent with the facts alleged by plaintiff and attested to in her own affidavit. See Plaintiff's Exhibit C, Affidavit of Amaal Aziz. Plaintiff does not dispute that she executed the license to encroach. Rather, plaintiff simply disputes the validity of defendant Merzah's *subsequent* conveyance of 22877 Hillock to his brother Mirza. The documentary evidence presented by movants indicates that this conveyance occurred nearly six years after the execution of the license to encroach. See Movants' Exhibits A and B. Therefore, the Court finds that plaintiff's signature on the license to encroach cannot estop her from claiming that the subsequent conveyance of the property was fraudulent.

For the same reasons that movants' request for summary disposition must be denied, plaintiff's complaint clearly cannot be characterized as frivolous. As such, the Court finds that sanctions are not warranted in this matter.

V

Based on the foregoing, it is hereby

ORDERED defendants Mirza, Shakarchi and MMI's motion for summary disposition is DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

⁴ Plaintiff does not deny her involvement in this litigation, so it appears that "Amalsalimaziz Mirza" refers to Amaal

SO ORDERED.

DATED:

cc: Lawrence Stockler
Samuel Sanom

Peter J. Maceroni,
Circuit Judge

PETER J. MACERONI
CIRCUIT JUDGE

MAY 25 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK

BY: *Carmella Sabaugh* Court Clerk